Asia Pacific Education Holdings Sdn Bhd v Ketua Pengarah Lembaga Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW APPLICATION WA-25–209–06 OF 2021
AMARJEET SINGH J
21 AUGUST 2023

Revenue Law — Real property gains tax ('RPGT') — Assessment — Director-General of Inland Revenue ('DGIR') required disposer of majority shares in company to pay RPGT on ground company was 'real property company' under RPGT Act 1976 ('RPGTA') — Disposer appealed to Special Commissioners of Income Tax ('SCIT') against DGIR's decision under s 18 RPGTA — While appeal was pending disposer applied for judicial review ('JR') to quash DGIR's decision — Whether filing of JR application before SCIT appeal was heard was abuse of process of court — Whether no special circumstances were shown why JR application was necessary — Whether issues raised in JR application involved disputed questions of fact which only SCIT was best suited to hear and determine — Whether court could not determine the issues on affidavit evidence or usurp function of SCIT

The applicant herein was the majority shareholder in a company ('APS') which owned a building that sat on land owned by another party ('APIIT'). A group which intended to acquire the said building and land used its subsidiary company ('Tenby') to enter into an agreement with the applicant to buy over its shareholding in APS ('the share SPA') and to enter into an agreement with APIIT ('the land SPA') to buy over the land. Tenby nominated APS to be the acquirer of the land. Following the performance of the said agreements, the respondent ('DGIR') raised an assessment against the applicant requiring it to pay tax under the Real Property Gains Tax Act 1976 ('the RPGTA') on the disposal of its shares in APS on the ground that APS was a 'real property company' as defined in para 34A(6) Schedule 2 of the RPGTA. The DGIR contended that APS had become a real property company from the acquisition of the land before the applicant disposed of its shares in APS to Tenby. The applicant appealed to the Special Commissioners of Income Tax ('SCIT') against the DGIR's decision pursuant to s 18(1) of the RPGTA but before the appeal was heard, filed the instant judicial review ('JR') application for an order to quash the DGIR's assessment. In the JR application, the applicant attacked the DGIR's decision to raise the assessment on grounds of illegality, irrationality and denial of the applicant's legitimate expectation. In opposing the JR application, the DGIR submitted that it was an abuse of process for the applicant to file the JR application when it had not exhausted the appeal to the SCIT. The DGIR said the applicant had also not shown special circumstances

why it was necessary to file the JR application instead of exhausting the appeal procedure. In reply, the applicant submitted that the DGIR should not be allowed to again raise the issue of the s 18 appeal procedure during the substantive hearing of the JR application when it was already canvassed before the court when leave was sought to file the application. The applicant said since the court had granted leave for the JR application to be filed, that in itself meant special circumstances existed. In any case, the applicant submitted that the DGIR had not considered the true purport of paras 15, 16 and 34A of Schedule 2 of the RPGTA and had misapplied the law in determining the date of disposal of the chargeable asset.

Held, dismissing the JR application:

(1) The DGIR was entitled to raise the issue of alternative remedy during the substantive hearing of the instant application because the issue was not decided at the leave stage. The judge who granted the leave clearly stated that the issue should be dealt with at the substantive hearing (see paras 34 & 37).

(2) It was an abuse of process of the court for the applicant to file the instant JR application before exhausting the alternative remedy available to it under s 18(1) of the RPGTA. The applicant had not only failed to demonstrate any exceptional circumstances for filing the instant application but, more importantly, the matters raised involved questions of fact which could only be determined by the SCIT after hearing all the evidence and making the necessary findings of fact. Only then could it be known whether the DGIR was wrong in not applying para 16 of Schedule 2 of the RPGTA. The court could not decide the disputed issues based on affidavit evidence. Otherwise, it would be usurping the function of the SCIT against the intention of the Legislature and this court's power of review (see paras 2 & 62).

(3) The facts and circumstances presented by the applicant did not establish any illegality in the sense of 'a clear lack of jurisdiction' or 'unlawful treatment'. The DGIR had acted according to the powers conferred on him and therefore he was within the scope of, and not beyond, his jurisdiction as set out in the RPGTA. The DGIR was the taxing authority established under the RPGTA and was empowered to levy tax by way of assessments. In carrying out this function, it was within the DGIR's power to carry out an audit, determine the appropriate assessment, decide whether a company was a real property company and when that company became so. Since there was a dispute as to whether the agreements were conditional contracts or not, it was a finding of fact that the SCIT had to make. The SCIT was further empowered to confirm, discharge or amend the assessments that had been made by the DGIR (see paras 53–55).

(4) The facts presented to the court also did not show any blatant failure on the part of the DGIR to perform some statutory duty. The provisions of law that were referred to by the applicant in its grounds for the review did not impose any statutory duty on the part of the DGIR (see paras 56–57).

[Bahasa Malaysia summary

Pemohon di sini merupakan pemegang saham majoriti dalam sebuah syarikat ('APS') yang memiliki bangunan yang terletak di atas tanah milik pihak lain ('APIIT'). Kumpulan yang berhasrat untuk memperoleh bangunan dan tanah tersebut menggunakan anak syarikatnya ('Tenby') dengan cara membuat perjanjian dengan pemohon untuk membeli pegangan sahamnya dalam APS ('saham SPA') dan untuk membuat perjanjian dengan APIIT ('SPA Tanah') untuk membeli tanah tersebut. Tenby mencalonkan APS untuk menjadi pemeroleh tanah. Berikutan pelaksanaan perjanjian tersebut, responden ('KPHDN') telah melakukan taksiran terhadap pemohon yang memerlukannya membayar cukai di bawah Akta Cukai Keuntungan Harta Tanah 1976 ('AKHT') atas pelupusan sahamnya dalam APS atas alasan bahawa APS merupakan 'syarikat hartanah' seperti yang ditakrifkan dalam perenggan 34A(6) Jadual 2 RPGTA. KPHDN berhujah bahawa APS telah menjadi sebuah syarikat hartanah daripada pengambilalihan tanah itu sebelum pemohon melupuskan sahamnya dalam APS kepada Tenby. Pemohon merayu kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') terhadap keputusan KPHDN menurut s 18(1) AKHT tetapi sebelum rayuan didengar, Pemohon telah memfailkan permohonan semakan kehakiman ini ('SH') untuk mendapatkan perintah untuk membatalkan taksiran KPHDN. Dalam permohonan SH, pemohon mencabar keputusan KPHDN untuk menaikkan taksiran atas alasan menyalahi undang-undang, tidak rasional dan menafikan jangkaan sah pemohon. Dalam menentang permohonan SH, KPHDN berhujah bahawa ia merupakan satu penyalahgunaan proses bagi pemohon untuk memfailkan permohonan SH walhal ia belum menyelesaikan rayuan kepada PKCP. KPHDN berkata pemohon juga tidak menunjukkan keadaan khusus mengapa perlu memfailkan permohonan SH dan bukannya meletihkan prosedur rayuan. Sebagai jawapan, pemohon berhujah bahawa KPHDN tidak seharusnya dibenarkan membangkitkan semula isu prosedur rayuan s 18 semasa pendengaran substantif permohonan SH apabila ia telah pun dibicarakan di hadapan mahkamah apabila kebenaran diminta untuk memfailkan permohonan itu. Pemohon berkata memandangkan mahkamah telah memberikan kebenaran untuk permohonan SH difailkan, itu sendiri bermakna keadaan istimewa wujud. Walau apa pun, pemohon berhujah bahawa KPHDN tidak mempertimbangkan maksud sebenar perenggan 15, 16 dan 34A Jadual 2 AKHT dan telah menyalahgunakan undang-undang dalam menentukan tarikh pelupusan aset boleh dikenakan cukai.

Diputuskan, menolak permohonan SH:

(1) KPHDN berhak membangkitkan isu remedi alternatif semasa pendengaran substantif permohonan ini kerana isu itu tidak diputuskan di peringkat izin. Hakim yang memberikan kebenaran itu dengan jelas menyatakan bahawa isu itu harus dibincangkan semasa perbicaraan substantif (lihat perenggan 34 & 37).

(2) Merupakan penyalahgunaan proses mahkamah bagi pemohon untuk memfailkan permohonan SH ini sebelum melupuskan remedi alternatif yang tersedia untuknya di bawah s 18(1) RPGTA. Pemohon bukan sahaja gagal menunjukkan sebarang keadaan luar biasa untuk memfailkan permohonan ini tetapi, lebih penting lagi, perkara yang dibangkitkan melibatkan persoalan fakta yang hanya boleh ditentukan oleh PKCP selepas mendengar semua keterangan dan membuat penemuan fakta yang perlu. Selepas itu barulah dapat diketahui sama ada KPHDN terkhilaf kerana tidak menggunakan perenggan 16 Jadual 2 AKHT. Mahkamah tidak dapat memutuskan isu yang dipertikaikan berdasarkan keterangan afidavit. Jika tidak, ia akan merampas fungsi PKCP terhadap niat Badan Perundangan dan kuasa semakan mahkamah ini (lihat perenggan 2 & 62).

(3) Fakta dan keadaan yang dikemukakan oleh pemohon tidak menunjukan apa-apa yang menyalahi undang-undang dalam erti kata 'kekurangan bidang kuasa yang jelas' atau 'layanan yang menyalahi undang-undang'. KPHDN telah bertindak mengikut kuasa yang diberikan kepadanya dan oleh itu dia berada dalam skop, dan bukan di luar bidang kuasanya seperti yang dinyatakan dalam RPGTA. KPHDN ialah pihak berkuasa percukaian yang ditubuhkan di bawah RPGTA dan diberi kuasa untuk mengenakan cukai melalui taksiran. Dalam melaksanakan fungsi ini, adalah dalam kuasa KPHDN untuk menjalankan audit, menentukan penilaian yang sesuai, memutuskan sama ada syarikat itu adalah syarikat hartanah dan bila syarikat itu menjadi sedemikian. Memandangkan terdapat pertikaian sama ada perjanjian itu adalah kontrak bersyarat atau tidak, ia adalah satu penemuan fakta yang perlu dibuat oleh PKCP. PKCP seterusnya diberi kuasa untuk mengesahkan, melaksanakan atau meminda penilaian yang telah dibuat oleh KPHDN (lihat perenggan 53–55).

(4) Fakta yang dikemukakan kepada mahkamah juga tidak menunjukkan sebarang kegagalan secara jelas di pihak KPHDN untuk melaksanakan beberapa kewajipan berkanun. Peruntukan undang-undang yang dirujuk oleh pemohon dalam alasannya untuk semakan tidak mengenakan sebarang kewajipan berkanun di pihak KPHDN (lihat perenggan 56–57).]

Cases referred to

Allianz General Insurance Co (M) Bhd v Ketua Pengarah Hasil Dalam Negeri [2022] 4 MLJ 498; [2022] 1 LNS 650, CA (refd)

Bintulu Lumber Development Sdn Bhd v Director General of Inland Revenue (Civil Application No 01(f)-28–10 of 2019) (unreported), CA (refd)

Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri [2006] 1 MLJ 428; [2005] 4 CLJ 810, CA (refd)

Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2018] MLJU 590; [2018] 7 CLJ 487, HC (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185; [1987] CLJ Rep 110, SC (folld)

Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2019] 5 MLJ 236, CA (folld)

Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563; [2017] 2 CLJ 1, FC (refd)

Ketua Pengarah Hasil Dalam Negeri v Ensco Gerudi (M) Sdn Bhd [2023] 5 MLJ 159; [2023] 6 CLJ 350, CA (refd)

Ketua Pengarah Hasil Dalam Negeri v The Pataling Rubber Estates Limited [2010] MLJU 1301; [2010] 5 CLJ 286, HC (refd)

Magnum Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2018) MSTC 30–151 (distd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (folld)

Metacorp Development v Ketua Pengarah Hasil Dalam Negeri [2011] 5 MLJ 447, HC (distd)

Multi-Purpose International Limited v Ketua Pengarah Hasil Dalam Negeri [2020] MLJU 202; [2020] 1 LNS 49, HC (distd)

National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99; [1993] 4 CLJ 339, SC (refd)

Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri [2018] 1 MLJ 376; [2018] 8 CLJ 298, CA (refd)

Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707; [2002] 3 CLJ 624, CA (refd)

Tune Insurance Malaysia Berhad v Ketua Pengarah Hasil Dalam Negeri [2019] MLJU 933; [2019] 1 LNS 1276, HC (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)

Legislation referred to

Rules of Court 2012 O 53

Interpretation Acts 1948 and 1967 s 30, Schedule 2, paras 15, 15(2), 16, 34A, 34A(6)

Real Property Gains Tax Act 1976 ss 2, 7, 18, 18(1)

Vijey M Krishnan (with William Wong) (Raja, Darryl & Loh) for the applicant.
Ashrina bt Ramzan Ali (with Wan Khairuddin bin Wan Montil, Surani bt Che Ismail and Athari Faris Ammery bin Hussein) (Senior Revenue Counsel, Inland Revenue Board of Malaysia) for the respondent.

Amarjeet Singh J:

INTRODUCTION

[1] On 10 April 2023, I dismissed an application for judicial review by Asia Pacific Education Holdings Sdn Bhd ('the applicant') wherein an order of certiorari to move into this court for the purpose of it being quashed the assessment raised by the respondent, the Director General of Inland Revenue ('DGIR') stated in the notice of assessment dated 15 March 2021 which was issued to the applicant for the year of assessment ('YA') 2019 ('the impugned assessment').

[2] In my view, it is an abuse of the process of the court to file the instant application for judicial review which should be determined by the Special Commissioners of Income Tax ('the SCIT') on appeal in light of the alternative remedy provided under sub-s 18(1) of the Real Property Gains Tax Act 1976 ('the RPGTA'). The applicant in my view not only failed to demonstrate exceptional circumstances for filing the instant application for judicial review but more importantly the matters raised was a question of law and fact which could only be determined by the SCIT on appeal after hearing all the evidence and making the necessary findings of fact.

[3] In doing so, I was not persuaded by counsel who submitted that the facts were not in dispute and the issue before me was a question of law, namely whether the DGIR could treat a company, to wit, Asia Pacific Schools Sdn Bhd ('APS') as a real property company in disregard of para 16 read together with para 15(2) of Schedule 2 of the RPGTA. The reasons for my decision are as follows.

BACKGROUND FACTS

[4] APS is a company that provides smart teaching and learning curriculum in a group of schools. The shareholding in APS is substantially owned by the applicant. APS is the owner of the building operated as a school on a piece of land but is not the owner of the land on which the building stands ('the school building'). The land on which the school building stands ('the land') is owned by APIIT Sdn Bhd ('APIIT').

[5] International School Partnership Ltd ('ISPL') intended to acquire the APS group of schools, the building and the land. It did so by through Tenby Educare Sdn Bhd ('Tenby'), its subsidiary company which operated several private education institutions. Tenby would in the scheme of things:

(a) enter into a share purchase agreement for APS's shares; and

(b) enter into a sale and purchase agreement to purchase the land.

[6] On 7 December 2018, the applicant entered into a share purchase agreement ('the share SPA') to sell its shares in APS to Tenby. The share sale was approved by the Ministry of Education on 1 March 2019. Also, on 7 December 2018, Tenby entered into a sale and purchase agreement ('the land SPA') to acquire the land from APIIT wherein APS was nominated to be the acquirer of the land. The acquisition of the land was approved by the State Authority on 26 June 2019.

[7] The DGIR in a letter dated 2 March 2020 sought certain documents on an audit he was conducting on the applicant. The applicant complied with the request which resulted in an exchange of communication between the parties as per letters dated 5 October 2020, 18 December 2020 and 5 February 2021. The DGIR, after considering the documentary evidence informed the applicant in a letter dated 24 February 2021 his decision to raise the impugned assessment against the applicant. The DGIR explained that he found that APS was a real property company as defined in para 34A(6), Schedule 2 of the RPGTA at the date of share SPA ie 7 December 2018 which is the date the land was acquired under the land SPA. Thus, the applicant was subject to real property gains tax under the RPGTA upon disposal of the APS's shares.

[8] The applicant disagreed with the decision of the DGIR and this resulted in discussions and explanations on the matter in another round of letters being exchanged between the parties (see the letters dated 24 February 2021, 5 March 2021 and 9 March 2021). The DGIR was not persuaded by the explanation given by the applicant pertaining APS being a real property company and proceeded to raise the impugned assessment against the applicant.

[9] The applicant, on 5 April 2021 filed an appeal against the impugned assessment to the SCIT under sub-s 18(1) of the RPGTA and while that appeal was pending, the applicant on 11 June 2021, filed the instant judicial review application seeking an order of certiorari to quash the impugned assessment.

THE IMPUGNED ASSESSMENT

[10] In the instant case, the DGIR made a finding from the audit including discussions and explanations vide the exchange of letters that the disposal of APS shares by the applicant to Tenby was subject to real property gains tax. The DGIR found that APS, on 6 May 2019, the date of the disposal of the shares was a real property company. A 'real property company' is defined in para 34A(6), Schedule 2 of the RPGTA to mean:

> A controlled company to which subparagraph (a) is not applicable, but which, at any date after 21 October 1988, acquires real property or shares or both whereby the defined value of real property or shares or both owned at that date is not less than seventy-five per cent of the value of its total tangible assets.

[11] The phrase 'controlled company' is defined in sub-para 34A(6) Schedule 2 of the RPGTA to mean 'a controlled company as defined under the Income Tax Act 1967'. Under the ITA, a 'controlled company' is defined to mean, 'a company having not more than fifty members and controlled, in the manner described by section 139, by not more than five persons'.

[12] The phrase 'real property' is defined in s 2 of the RPGTA to mean:

> any land situated in Malaysia and any interest, option or other right in or over such land

[13] The DGIR found the following facts based on the documents produced at the audit. The applicant together with Teknologi Pantas Sdn Bhd ('TPSB'), were owners of 2,500,002 and 250,000 units of ordinary shares in APS respectively. They sold their shares to Tenby ie the special purpose vehicle buyer of ISPL.

[14] Clause 4.1.2 in the share SPA shows that the applicant has interest in APS wherein APS has the said land which was put up as collateral to HSBC Bank as early as 19 December 2017. The applicant requires HSBC Bank's approval for the sale of the shares as well as the sale of the land pursuant to the RM250m facility obtained by the applicant from the said bank. The applicant, therefore had put up the land as early as 19 December 2017 as collateral for the facility and later disposed the shares of APS on 7 December 2018. Thus, according to the DGIR, at the time of the disposal of the shares on 6 May 2019 the APS shares were subject to real property gains tax.

[15] The DGIR, said that APS had the right or had obtained interest in the land and the land was a part of the disposal of the shares via the share SPA. This fact, according to the DGIR, would establish that APS had become a real property company at the time of disposal of APS shares by the applicant. While

APIIT, under the land SPA sold the land to Tenby. In the scheme of things between the parties, the land SPA was executed at the same time with the share SPA and the former was made an integral part of the latter because the sale of the land is the basis of the sale of the said shares. This scheme according to the DGIR, meant that on 7 December 2018, the date of the said agreements, APS had acquired the right and interest in the said land making it a real property company as the defined value of real property at that date was not less that seventy-five per cent of the value of APS's total tangible assets.

[16] The DGIR said that cl 13.2 of the land SPA allows the purchaser to nominate a person as the purchaser. APS was nominated and received the land as purchaser via letter dated 6 May 2019. The DGIR however, found that in substance the land was obtained by APS on 7 December 2018 or as early as 19 December 2017 and was made a crucial part of the share SPA. The entire scheme was perfected on 6 May 2019. In substance, the transactions show that the sale of the shares is the main transaction and the land became part of the share SPA. APS had obtained the land on 7 December 2018 wherein it became a real property company on the said date resulting in the APS shares being sold on 6 May 2019 to Tenby. Ultimately, all the transactions made APS the owner of the land and Tenby the owner of APS.

[17] According to the DGIR, since the land obtained by APS has the defined value of real property at that date of not less than seventy-five per cent of the value of its total tangible assets which made APS a real property company following which the disposal of APS shares by the applicant became subject to real property gains tax. The transactions alluded to above, shows the intention of the parties of the scheme of things ie to give the land to APS while the actions of the applicant reflected the implementation of the said intention wherein the land was given to APS through indirect transactions.

[18] The following information was gleaned from 'Form BPS VIII' which is an application to sell, dispose or to redevelop a private development institute by APS: (i) the applicant disposed shares to Tenby, who was ISPL's subsidiary company and operating several private education institutions, and who was to receive the shares; (ii) APS received the said land; (iii) the directors of APS are foreign nationals; (iv) ISPL is the new owner; and (v) ISPL continues the re-development of APS through Asia Pacific Schools Sdn Bhd. According to the DGIR, the facts clearly show that the scheme was that the land be acquired by APS which was the owner of the school building which stood on the land through the mechanism of the share SPA and the land SPA both executed on the same date ie 7 December 2018. In this scheme it is clear that the sale of the said land is a crucial part of the sale of shares transaction.

[19] The DGIR said that although there is a requirement labelled as

'condition precedent' in the share SPA and land SPA the actions of the parties were that the shares in possession of the applicant be sold to Tenby and Tenby in turn acquires the land and nominates APS as the purchaser. The intention all along was to make APS the owner of the land. This was the scheme of things and a crucial part of the share SPA. The transfer of the shares made APS owner or acquired the right and interest in the said land accordingly became a real property company.

[20] The DGIR considered the share transaction as a whole and found that the condition labelled by the applicant as condition precedent in actual fact is not a condition precedent, that is to say, that the approval from the State Authority on the acquisition and disposal of the land had no bearing on the scheme. The share had the land being identified and made part of the sale of shares, shows that APS has acquired rights and interest in the said land. The reference as the land as APS Land in the share SPA clearly shows that at the time of disposal of the said shares, APS had acquired the said land at the latest on 7 December 2018 ie before the disposal of the shares.

[21] The DGIR found on the facts that APS had become a real property company on 7 December 2018 according to the scheme of things as reflected in the land SPA between APIIT and Tenby and at the same time the said land was stated as APS land in the share SPA which made the land a crucial part of share SPA. The DGIR found that the transactions are between controlled companies. The applicant is a controlled company and had acquired shares in a real property company. At the time of the disposal of APS shares, the land had been acquired making APS a real property company. Thus, the disposal of APS shares to Tenby on 6 May 2019 is subject to RPGT.

GROUNDS OF REVIEW

[22] In the O 53 statement, the applicant states that the instant case is one where the 'circumstances are very exceptional' in that the impugned assessment was tainted with *illegality* and/or *irrationality* and/or deprivation of *legitimate expectation.*

[23] The *illegality* ground can be summarised as follows. The DGIR wrongly found that APS had acquired real property on 6 May 2019 when the actual date was 26 June 2019. In doing so, the DGIR failed to consider para 16 Schedule 2 of the RPGTA which provides that where the acquisition of a chargeable asset requires the approval of the government or body appointed by the government in a sale and purchase agreement, the date of the acquisition would be the date of such approval being obtained ie 26 June 2019, on the facts of the instant case. In coming to the finding the DGIR also failed to consider:

(a) the decision in *Ketua Pengarah Hasil Dalam Negeri v The Pataling Rubber*

Estates Limited [2010] MLJU 1301; [2010] 5 CLJ 286 on the interpretation of para 16 Schedule 2 of the RPGTA; and

(b) the principles of construction of a taxing statute provided in *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339 and *Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428; [2005] 4 CLJ 810.

[24] The *irrationality* ground was framed as follows. A reasonable person or body similarly circumstanced would not have decided in the manner in which the DGIR did, in particular, considering the facts and paras 15(2) and 16 Schedule 2 of the RPGTA. In doing so the DGIR did not give even the briefest of thought to the High Court decision case of *Pataling Rubber Estates* and the decisions in *National Land Finance* and *Exxon Chemical* on the interpretation and construction of a taxing stature. And finally, on *legitimate expectation* it was stated that the applicant had the expectation that the DGIR would take cognisance of the decision in *Pataling Rubber Estates.*

THE DGIR'S SUBMISSION

[25] It was firstly submitted on behalf of the DGIR that the instant judicial review application is an abuse of the process of court as the applicant failed to demonstrate the existence of exceptional circumstances to proceed with judicial review when there is available a domestic appeal procedure. The RPGTA provides an avenue of appeal under s 18 to the SCIT by an aggrieved taxpayer against an assessment raised by the DGIR.

[26] The DGIR cited the decision of the Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110 which established the principle that the court will exercise its discretion allowing the remedy of judicial review in exceptional circumstances when there is available a domestic appeal procedure.

[27] It was secondly submitted that there are certain issues that involve question of facts and law, such as, whether the disposal of shares in the instant case involve a real property company and the finding would be one of fact. It was also argued that the application in essence a question concerning the merit of the impugned assessment and any such question is a matter to be determined by the SCIT.

THE APPLICANT'S SUBMISSION

[28] The applicant firstly opposed what is termed as a re-ventilation of the domestic remedy issue on the basis that the same had been fully argued and

decided by this court at the leave stage with the participation of the DGIR — then the putative respondent on invitation by the court — and this court had rejected the argument and granted leave. It was further submitted that the granting of leave demonstrated that there were exceptional circumstances and as such the issue canno be raised again.

[29] The applicant, in the alternative, submitted that the instant case fell within the principle of *Jagdis Singh* and the applicant was entitled to bring judicial review proceedings notwithstanding that its appeal to the SCIT was pending. In its written reply, the applicant submitted that the case before me was a 'classic case of *illegality,* and *irrationality* and *unreasonableness,* and *clear lack of jurisdiction* and *blatant failure to perform a statutory duty'*. The last two grounds were added in submissions and does not appear in the O 53 statement. It was further contended that the DGIR, 'must apply the black letter of the law and case law authority, and cannot impose his own requirements in the legislation simply on taxpayers'.

[30] To support the above contention, the circumstances claimed to be exceptional circumstances were that the DGIR in raising the impugned assessment had failed to consider the true effect of paras 15, 16 and 34A of Schedule 2 of the RPGTA. In doing so, the DGIR did not apply the decision in *Pataling Rubber Estates* which had held that the date of disposal of an asset with regard to a conditional contract where approval of the Government is required is the date of such approval as provided in para 16 Schedule 2 of the RPGTA. It is contended that the failure to follow the above provisions and the case of *Pataling Rubber Estates* resulted in the DGIR making an error as to the correct date of disposal and therefore wrongly raised the tax against the applicant.

[31] The cases of *Metacorp Development v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 MLJ 477; *Magnum Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2018) MSTC 30–151 at p 8654; *Tune Insurance Malaysia Berhad v Ketua Pengarah Hasil Dalam Negeri* [2019] MLJU 933; [2019] 1 LNS 1276 and *Multi-Purpose International Limited v Ketua Pengarah Hasil Dalam Negeri* [2020] MLJU 202; [2020] 1 LNS 49 were cited to show that the test of exceptional circumstances in *Jagdis Singh* was was satisfied.

DECISION OF THE COURT

[32] The question to be determined at the outset is whether the DGIR is entitled to raise the issue that the instant application for judicial review is an abuse of the process of the court for in view of the existence of the alternative remedy of appeal to the SCIT provided by the Legislature in the RPGTA.

Whether the alternative remedy issue can be raised?

[33] The first submission by the applicant was that the issue of alternative remedy was fully argued and determined by Noorin Badaruddin, the learned judge who heard and allowed the application for leave to commence the instant judicial review application. The second and related submission was that the granting of leave demonstrated that the exceptional circumstances test was satisfied and therefore cannot be raised again.

[34] The first submission is devoid of merit and is against what was decided by the learned judge as shown in Her Ladyship's written judgment dated 22 June 2022 (filed as encl 43). There Her Ladyship followed the decision in *Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2018] MLJU 590; [2018] 7 CLJ 487, to wit, 'the existence or non-existence of a sufficient alternative remedy is something that should be canvassed at the substantive stage and is therefore a premature objection to be raised now at the leave stage'. The decision of Her Ladyship are encapsulated in the following words:

> This court takes the position that the availability of the domestic remedy is irrelevant at this stage and the matter raised herein should be dealt with at the substantive stage.

[35] The second submission: that the granting of leave demonstrated that the exceptional circumstances test was satisfied is also devoid of merit. My reasons for rejecting the submission is that the purpose of the exceptional circumstances test has nothing to do with the merit of the application but whether the application should be allowed in the first place. Leave on the other hand, is permission to commence judicial review proceedings. The exceptional circumstances test only arises when there is an alternative remedy provided by statute that has not been exhausted. The test determines whether the judicial review application ought to be dismissed on account of the availability of the alternative remedy. On the other hand, the test whether leave ought to be granted is for a different purpose and has been settled in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478. The leave test acts as a sieve to ensure that only an arguable case proceeds to the substantive stage.

[36] A connected issue is the stage at which the issue of alternative remedy can be raised. The Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65 provided the answer and said that it could be at the leave stage or at the substantive stage as there is no hard and fast rule. The position is set out clearly in the following passage in the judgment (cited cases omitted):

> As we have said, ... the existence of alternative remedies *would be a ground for refusing leave to apply for judicial review. It is also a ground for setting aside a grant of leave given earlier.* Again, the alternative remedies argument may be considered at the *inter partes* stage, even if leave had been granted and not challenged. *At the final hearing stage, the court can consider the alternative remedies objection as a preliminary point* or at a later stage. (Emphasis added.)

[37] In the instant case, the issue of alternative remedy was not decided at leave stage and was left to be heard and decided at the substantive stage. As such, based on the principles stated in *Majlis Perbandaran Pulau Pinang,* I hold that the DGIR is entitled to raise the issue of alternative remedy to be decided at the substantive stage.

The alternative remedy issue

[38] The next question is whether the instant application for judicial review is an abuse of the process of court in view of the non-exhaustion of the alternative remedy, provided in the RPGTA, of an appeal by an aggrieved taxpayer to the SCIT against the assessment of the DGIR.

[39] It is necessary to begin with the law in this somewhat vexed and/or misunderstood area. The landmark case is *Jagdis Singh.* There the Supreme Court said that a remedy seeking judicial review should not be made available where the statute provides for an alternative remedy unless exceptional circumstances are shown. *Jagdis Singh* was a tax case where an assessment of the DGIR was sought to be quashed by judicial review under the ITA which is the same position of an assessment to be quashed under the RPGTA, as the same provisions of an appeal to the SCIT applies for assessments under the RPGTA.

[40] It suffices to say that the test of exceptional circumstances has been consistently applied in tax cases and was reiterated again by the Federal Court in *Bintulu Lumber Development Sdn Bhd v Director General of Inland Revenue* (Civil Application No 01(f)-28–10 of 2019) (unreported) (see the decision of the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Ensco Gerudi (M) Sdn Bhd* [2023] 5 MLJ 159; [2023] 6 CLJ 350 which discussed the broad grounds for the decision rendered in the *Bintulu Lumber Development* case.

[41] In *Jagdis Singh* the High Court issued the order of certiorari to quash the assessment. On appeal, the issue was whether the application for judicial review ought to have been dismissed in light of the alternative remedy of appeal to the SCIT which was not exhausted. The Supreme Court after considering various cases on the subject propounded the following principle, the ratio decidendi of the case, which have been often-quoted by our courts at the High Court and

Court of Appeal since:

> A clear principle is reiterated here ie it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. *Judicial review is always at the discretion of the Court but where there are other avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.*
>
> In answer to the first question we would therefore hold that the discretion is still with the Courts but where there is an appeal provision available to the applicant *certiorari* should not normally issue unless there is shown *a clear lack of jurisdiction* or a *blatant failure to perform some statutory duty* or in appropriate cases a *serious breach of the principles of natural justice.* (Emphasis added.)

[42] This brings me to the next important issue: what amounts to very exceptional circumstances. The decision of the Court of Appeal in *Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2019] 5 MLJ 236 (followed in *Allianz General Insurance Co (M) Bhd v Ketua Pengarah Hasil Dalam Negeri* [2022] 4 MLJ 498; [2022] 1 LNS 650) is instructive. It said that exceptional circumstances mean 'unusual circumstances' and not 'typical circumstances' and what amounts to exceptional or unusual circumstances must depend on the factual matrix of each case.

[43] Therefore, the facts alleged in the application for judicial review is of primary importance. The facts must, of course, be undisputed as the remedy of judicial review concern the legal significance of undisputed or admitted facts and does not involve the review court resolving a disputed question of fact or making of a finding of fact. Under, the RPGTA, like the ITA, resolving disputes of fact is the function of the SCIT. If there are disputes of facts, the application for judicial review will be dismissed as the proper forum to resolve such dispute is the SCIT (see *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563; [2017] 2 CLJ 1).

[44] This brings me to the other apex court case where the issue of alternative remedy was discussed. It is the *Majlis Perbandaran Pulau Pinang* case. There the Federal Court said that where the alternative remedy concerns a specialised body, judicial review will not be granted in the following words:

> *Having said that* we recognise that there are certain classes of cases such as planning, employment cases and tax cases …, where a statute provides for a specialised appeal procedure, and so the courts understandably may not grant judicial review but this is always subject, to the grant of review in certain cases for example, where an applicant is able to demonstrate excess or abuse of power, or breach of the rules of natural justice.

[45] The words 'having said that' referred to one of preceding paragraphs which have been cited subsequently by some decisions where *illegality* appears

to be another ground to allow judicial review proceedings to be heard in the following paragraphs:

> Speaking generally, it is right to say, that if an applicant in judicial review proceedings can demonstrate *illegality, that is to say unlawful treatment,* it would be wrong to insist that he exhaust his statutory right of appeal where one is available. Why should illegal action be not nipped in the bud by the quicker, more convenient and adequate remedy of Judicial Review rather appeal? It is**,** of course, true that convenience in this context means convenience not only for the parties but also in the public interest. (Emphasis added.)

[46] There, *illegality,* was specifically referred to as 'unlawful treatment'. In this regard, the position was clarified by Gopal Sri Ram JCA (as His Lordship then was) speaking for the court in *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707; [2002] 3 CLJ 624. His Lordship said that the law on alternative remedy was settled in *Jagdis Singh* and that lack of jurisdiction' comes within the general category of *illegality*. The following paragraphs of the judgment is instructive.

That brings us to the next point, which we will call 'the alternative remedy' argument. We find copious citation of authorities on this part of the case to be wholly unnecessary. In our view, the law is well settled. It has been settled by the judgment of that eminent judge, Hashim Yeop A. Sani SCJ (as he then was) delivering the decision of the Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110 where he said:

> In answer to the first question we would therefore hold that the discretion is still with the courts but where there is an appeal provision available to the applicant *certiorari* should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.
>
> We may add that 'lack of jurisdiction' now comes within the category of illegality formulated by Lord Diplock in his Delphic speech in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. And it is in that context that our Federal Court applied it in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65.

[47] The 'clear lack of jurisdiction' vis a vis *illegality* was applied by the Court of Appeal in *Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri* [2018] 1 MLJ 376; [2018] 8 CLJ 298). In that case, the DGIR had no jurisdiction to raise the tax on the society under the ITA when the society had been exempted from tax under the repealed Income Tax Ordinance. The vested right from the exemption under the repealed ordinance was not revoked by any provision of the ITA, when the latter came into force, and was still in force by virtue of s 30 of the Interpretation Acts 1948 and 1967. Tengku Maimun Tuan Mat JCA (as Her Ladyship then was) said:

Given that the respondent acted without jurisdiction, the third issue has to be resolved in favour of the appellant. Notwithstanding that it has failed to resort to the appeal procedure under s 99 of the ITA 1967, the appellant cannot be precluded from applying for judicial review. This principle was set out in *Government of Malaysia & Anor v Jagdis Singh* where Hashim Yeop Sani SCJ said ...

[48] In the same vein, the principle was reiterated in the case of *Mudah.my* where the Court of Appeal held:

> Obviously, the respondent, in the circumstance of this appeal had failed to fulfil the principles so lucidly stated by the Supreme Court in *Jagdis Singh.* In our judgment, there *was no clear lack of jurisdiction for the field audit conducted by the appellant was within its statutory powers under* ss 80 and 81 of Act 53, neither was there any proof of a blatant failure by the appellant to perform its statutory duty nor any serious breach of natural justice. (Emphasis added.)

[49] Thus, by virtue of these two apex court decisions the following, if the facts so establish, have been accepted as amounting to exceptional circumstances:

(a) a clear lack of jurisdiction vis a vis the general ground of *illegality* or 'unlawful treatment';

(b) a blatant failure to perform some statutory duty; and

(c) in appropriate cases a serious breach of the principles of natural justice; and

Applying the test

[50] As alluded to above the applicant's case was that the facts and circumstances before the court raises exceptional circumstances, namely, *illegality* or a *blatant failure to perform a statutory duty.* To determine whether the exception circumstances test is satisfied, the factual matrix presented to the court is crucial.

[51] The factual matrix produced before me show that the DGIR had made a finding on the documents and scheme of the transactions that APS is a real property company. The finding was made based on the following facts:

(a) the share SPA and the land SPA;

(b) the fact that the land had been put up as collateral to HSBC Bank as early as 19 December 2017 and that HSBC's approval for the sale of APS shares was needed by the applicant pursuant to the facility of RM250m obtained by the applicant from the said bank;

(c) the fact that by virtue of the share SPA, APS has the right or obtained interest in the land;

(d) the fact that the land was an integral and crucial part of the share SPA; and

(e) that what the parties labelled as condition precedent in the share SPA and the land SPA was not a true condition precedent in view of the fact that APS had acquired rights and interest in the land before the disposal of the APS shares.

[52] To the DGIR, APS had on the said facts become a real property company before the disposal of the shares by the applicant and therefore para 16 Schedule 2 of the RPGTA relied heavily by the applicant does not apply. The applicant, on the other had refuted the DGIR's assessment and analysis of the facts and said that the DGIR failed to appreciate that the share SPA and the land SPA were conditional contracts and therefore by virtue of para 16 Schedule 2 of the RPGTA, the date of disposal of the asset was when the Government approval was obtained and not the date stated by the DGIR. The DGIR failed to consider that the interpretation of para 16 made by the High Court in *Pataling Rubber Estates* was binding him, and the DGIR must follow the requirements of legislation and not supplant and add words into the same as established in *National Land Finance* and *Exxon Chemical.*

'A clear lack of jurisdiction' or 'unlawful treatment'

[53] I found that the facts presented to me did not establish the situation of *illegality* ie a clear lack of jurisdiction or unlawful treatment. The DGIR had clearly acted within his jurisdiction and exercised his powers within that jurisdiction. He was exercising powers under the RPGTA and arrived at the assessment that para 16 did not apply as he found the agreements were not true conditional contracts on the facts before him which revealed that APS was already a real property company. In my mind, where there is such a dispute, the condition precedent ie that the agreements are truly conditional contracts for the application of para 16 as reflected in *Pataling Rubber Estates* is not triggered. In these circumstances, the DGIR cannot be said to have flouted the principles stated in *National Land Finance* and *Exxon Chemical.* In such circumstances the finding of fact is for the SCIT to make.

[54] I found that the facts and circumstances presented did not establish *illegality* in the sense of 'a clear lack of jurisdiction' or 'unlawful treatment'. The DGIR was acting according to the powers conferred on him and therefore he was within the scope of and not beyond his jurisdiction as set out in the RPGTA. The DGIR is the taxing authority established under the RPGTA and empowered to levy tax by way of assessments. In carrying out this function it is

within his power to carry out an audit, determine the appropriate assessment, decide whether a company is a real property company and when that company became a real property company.

[55] The DGIR is empowered to use his judgment based on the facts before him. It is envisaged that he cannot be one hundred percent correct all the time when exercising his powers and that is why the Legislature has established the SCIT and the avenue of appeal for taxpayers aggrieved with the assessment raised against them by the DGIR. The SCIT is empowered to make findings of fact on the evidence led before them and is further empowered to confirm, discharge or amend the assessment made by the DGIR (see para 26 Schedule 5 of the ITA). Thus, if the DGIR wrongly made an assessment, the SCIT can discharge the same without more. The SCIT is conferred the jurisdiction to not only put right excessive or incorrectly increased taxes but also put right by setting aside taxes which the SCIT is of the view were erroneously raised against the taxpayer.

'Blatant failure to perform some statutory duty'

[56] The facts presented to me did not show any blatant failure on part of the DGIR to perform some statutory duty. In fact, my attention was not even drawn to any statutory provision in any written law that imposed a statutory duty on the DGIR. It is elementary that before there can be a breach of statutory duty there must be identified a statutory duty that was breached. The question is what statutory duty did the DGIR allegedly breach? It is incumbent on the taxpayer to identify the provision that contains the statutory duty. The language of the provision must impose an unqualified statutory obligation or a statutory prohibition or statutory command on the DGIR in relation to the assessment raised against the taxpayer. The statutory duty must then be 'blatantly' breached by the DGIR. 'Blatantly' is what it means — the doing of something so obviously or intentionally knowing it is against the duty imposed on him. Only then it would amount to a blatant breach of statutory duty amounting to exceptional circumstances envisaged by the Supreme Court in *Jagdis Singh.*

[57] In the instant case, the applicant referred to paras 15, 16 and 34A of Schedule 2 of the RPGTA which were also the provisions referred to when submitting on *illegality* as discussed above. Firstly, the said paragraphs do not impose a statutory duty on the DGIR. The paragraphs appear in Schedule 2 which contain supplementary provisions for the purpose of s 7 of the RPGTA which is the provision providing the manner in which the disposal price and acquisition price of a chargeable asset is computed when the same is disposed. It also provides for connected matters of determining the date of disposal. The disposal price and the acquisition price of such asset will determine whether

there is a chargeable gain. A gain would then be chargeable with tax. Section 7 of the RPGTA is reproduced below for its effect:

(1) Where a chargeable asset is disposed of, then —

(a) if the disposal price exceeds the acquisition price, there is a chargeable gain;

(b) if the disposal price is less than the acquisition price, there is an allowable loss; and

(c) if the disposal price is equal to the acquisition price, there is neither a chargeable gain nor an allowable loss.

(2) In this section, an allowable loss means a loss suffered on the disposal of a chargeable asset which, if it had been a gain, would have been chargeable with the tax.

(3) *Subsection (1) shall be subject in its operation to Schedule 2, which shall have effect for computing acquisition and disposal prices and otherwise as provided therein.*

(4) Where —

(a) there is an allowable loss in respect of a disposal, such allowable loss shall be allowed as a deduction to reduce the total chargeable gain of a person for a year of assessment in which the disposal was made; and

(b) by reason of an insufficiency or absence of total chargeable gain for the year of assessment in which the allowable lose arose, effect cannot be given in full to paragraph (a), the allowable loss which has not been so allowed (or so much thereof as has not been so allowed for that year) shall be allowed as a deduction to reduce the total chargeable gain of a person for the first subsequent year of assessment for which there is total chargeable gain and so on for subsequent years of assessment until the whole amount of the allowable loss to be allowed has been allowed.

(5) For the purposes of subsection (4), in the case of an individual, the chargeable gain referred to in that subsection shall exclude any amount exempt under Schedule 4. (Emphasis added.)

[58] Thus, Schedule 2 provides the method of deriving chargeable gain and allowable loss which includes the date of disposal of a chargeable asset and whether a company is a real property company for such purpose. There was no statutory duty on the DGIR as such. The DGIR was exercising his powers under the RPGTA and arrived at the assessment based on the facts that para 16 of Schedule 2 of the RPGTA did not apply as he found the agreements were not true conditional contracts on the facts before him which revealed that APS was already a real property company. In my mind, and as shown above, where there is such a dispute, the condition precedent in para 16 ie that the agreements are truly conditional contracts is to be determined by the SCIT. If there was no dispute that the agreements were conditional contracts then the DGIR would be wrong in not complying with not a statutory duty but with the decided

case-law ie *Pataling Rubber Estates.*

Cases cited by the applicant

[59] It suffices to say that the cases cited by the applicant ie *Metacorp Development*, *Magnum Holdings*, *Tune Insurance* and *Multi-Purpose International* are distinguishable on the facts. Copious citation of authorities does not help if the facts are not on all fours with the present case. As observed above, each case would depend on its own factual matrix. For the sake of repetition, it was shown above that in the instant case the condition precedent for the invocation of para 16 Schedule 2 of the RPGTA was in dispute. Therefore, this is not a case where the DGIR has refused to follow a legal interpretation determined by the High Court or a court higher than the High Court.

[60] Further, the case of *Multi-Purpose International* was a decision concerning the leave stage where the learned judicial commissioner did not even decide on the issue of exceptional circumstances and left it for determination at the substantive stage of the application. The case therefore does not assist the applicant.

CONCLUSION

[61] The situation before me is a clear case where the applicant is clearly dissatisfied with the assessment made. A taxpayer who is dissatisfied with the assessment on grounds that the DGIR failed to consider relevant factors or took into account irrelevant factors (*irrationality*) or failed to apply the correct provisions of law on the facts or misdirected itself on the facts and so by failing to apply para 16 Schedule 2 of the RPGTA, or arrived at a decision no reasonable body or authority similarly circumstanced would have arrived at (*irrationality*) ought to appeal to the SCIT to have its dissatisfaction known and the impugned assessment set aside.

[62] In the instant case there were findings of fact to be made by the SCIT at the appeal stage. Only then could it be known whether the DGIR was wrong in not applying para 16 of Schedule 2 of the RPGTA. This court cannot decide the issues raised based on affidavit evidence that is clearly in dispute. Otherwise, this court will be usurping the function of the SCIT against the intention of the Legislature and this court's power of review.

[63] I was satisfied that there were no special or exceptional circumstances that would bring the instant application to be within the *Jagdis Singh* or *Majlis Perbandaran* cases. As such, the applicant should pursue the appeal that has been filed and is presently pending before the SCIT. For the above reasons the

application for judicial review was dismissed.

JR application dismissed.

Reported by Ashok Kumar